

NO. PD-0166-20

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
FILED
COURT OF CRIMINAL APPEALS
3/27/2020
DEANA WILLIAMSON, CLERK

DANNY WAYNE ALCOSER

v.

THE STATE OF TEXAS

From the Amarillo Court of Appeals
Cause No. 07-18-00032-CR

APPELLANT DANNY WAYNE ALCOSER'S
REPLY TO THE STATE'S PDR

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Responses to Grounds for Review

1. The court of appeals correctly applied the egregious harm standard as to the 3 offenses for which Appellant was convicted even though the court's opinion employed a blended harm analysis.
2. The court of appeals did not misapply the cumulative error doctrine.

Summary of the Argument

The jury charge in this case was a disaster — replete with errors. These errors not only impacted Appellant's self-defense claim as to the assault conviction, but also impacted his other 2 convictions. Because Appellant did not object to the charge, the court of appeals properly reviewed for egregious harm.

The court of appeals did not conduct a separate analysis as to each of the 3 offenses for which Appellant was convicted but instead conducted a blended analysis. Regardless, if the errors are considered separately as to each offense, egregious harm is shown.

Additionally, it cannot be said that the analysis by the court of appeals so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory authority.

This Court should refuse the State's petition for discretionary review.

Argument

- 1. The court of appeals correctly applied the egregious harm standard as to the 3 offenses for which Appellant was convicted even though the court's opinion employed a blended harm analysis.**

The court of appeals identified numerous errors throughout the jury charge. Rather than using separate sections of the opinion to address how the particular errors caused Appellant to suffer egregious harm with respect to each of the 3 offenses for which he was convicted, the court of appeals employed a blended egregious-harm analysis. Regardless, if the Court chooses to parse out the errors in the charge and analyze them individually as to each offense (as Appellant does below), this Court will see that the court of appeals correctly determined that Appellant suffered egregious harm as to each offense. Additionally, it cannot be said that the analysis by the court of appeals so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory authority.

- A. The court of appeals correctly recited the egregious harm standard**

The State agrees that the court of appeals correctly recited the standard of review under *Almanza* and its progeny for egregious harm.

This standard requires an appellate court to consider: 1) the entire jury charge, 2) the argument of counsel, 3) the entirety of the evidence, including the contested issues and weight of the probative evidence, and 4) any other relevant factors revealed by the record as a whole. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); accord *Hollander v. State*, 414 S.W.3d 746, 749-50 (Tex. Crim. App. 2013).

“Errors that result in egregious harm are those that affect ‘the very basis of the case,’ ‘deprive the defendant of a valuable right,’ or ‘vitally affect a defensive theory.’” *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005).

B. The court of appeals correctly applied the egregious harm standard

The court of appeals employed a blended analysis in its opinion addressing egregious harm. Here, Appellant will break the analysis down separately for each of the 3 offenses. In doing so, this Court will see that the court of appeals correctly applied the egregious harm standard even though it employed the blended analysis.

On a micro-level, the errors in the charge caused egregious harm with respect to each offense. On a macro-level, the charge is poorly constructed for several reasons. The court of appeals recognized this. *See Alcoser v. State*,

No. 07-18-00032-CR, 2019 WL 7044470, at *6-9 (Tex. App. – Amarillo Dec. 20, 2019, pet. filed).

The abstract definitions in the charge include proper definitions with respect to the charge of assault family violence with a prior conviction for assault family violence. (CR134-35)

The charge erroneously omitted the statutory definitions for the other 2 offenses alleged in the indictment. *See Arteaga v. State*, 521 S.W.3d 329, 334 (Tex. Crim. App. 2017) (charge must provide all applicable statutory definitions).

The abstract definition for knowingly conflated the statutory definitions of conduct-oriented, circumstances-oriented and result-oriented actions in a confusing manner. (CR135) This was particularly problematic because the charged offenses included result-oriented, conduct-oriented and circumstances-oriented crimes. But the definition provided in the charge failed to properly define this culpable mental state as to any of these alternatives. And at no point did the charge attempt to tailor the definition of “knowingly” or the other culpable mental states to the applicable conduct elements. *See Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015).

The instructions for self-defense immediately followed the application paragraph for interfering with an emergency call even though self-defense applied only to the assault charge. (CR139-40)

1. Appellant suffered egregious harm because of the charge errors related to assault family violence with a prior conviction

The court of appeals correctly held that Appellant suffered egregious harm because of the numerous errors in the charge related to the assault charge, especially, the errors related to self-defense.

The charge contains the following errors related to the assault charge:

- A) the term “knowingly” was not properly defined or tailored with regard to the result of the actor’s conduct; *see Price*, 457 S.W.3d at 441
- B) the term “recklessly” was somewhat truncated from the statutory definition regarding the result of the actor’s conduct¹

¹ Section 6.03(c) of the Penal Code defines the term “recklessly” in relevant part as follows:

A person acts recklessly, or is reckless, with respect to . . . the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that . . . the result will occur.

TEX. PEN. CODE § 6.03(c).

The charge defined the term as follows:

A person acts recklessly when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur.

(CR135)

C) the self-defense instructions contained numerous errors including:

- i. they failed to provide an application paragraph or other instruction advising the jurors that they should acquit if they found that Appellant acted in self defense
- ii. they failed to define “reasonable belief”
- iii. the placement of the self-defense instructions was confusing because the instructions immediately follow the application paragraph for interfering with an emergency call

These errors in the charge weigh in favor of a finding of egregious harm because they adversely impacted the jury’s ability to return a proper guilty verdict on the assault charge but, more importantly, prevented the jury from giving effect to Appellant’s claim of self-defense, even if they believed that he acted in self-defense. *See Hollander*, 414 S.W.3d at 750.

The State barely mentioned self-defense during argument. (8RR30) Defense counsel briefly discussed self-defense and generally argued that the evidence supported Appellant’s claim of self-defense for assault. (8RR37-39) But defense counsel did not discuss the law of self-defense in any detail and could not even direct the jurors to the part of the charge authorizing them to find him not guilty of assault because of this defense. Thus, this factor weighs in favor of a finding of egregious harm. *Cf. Barrera v. State*, 10 S.W.3d 743, 745-46 (Tex. App.—Corpus Christi 2000, no pet.) (defense counsel

argued extensively about the law and facts applicable to self-defense and concluded argument by asking jury to find client not guilty because of self-defense).

Appellant's primary defense to the allegations was that the complainant attacked him and he defended himself. He vigorously disputed her version of what happened. Accordingly, this factor weighs in favor of a finding of egregious harm. *See Hollander*, 414 S.W.3d at 751-53 (facts "hotly contested").

The court of appeals considered the fact that, on a macro level, the charge was replete with errors that impacted each offense as an "other relevant factor" in its egregious harm analysis. *See Almanza*, 686 S.W.2d at 171; *accord Hollander*, 414 S.W.3d at 750. The fact that this charge was riddled with errors should count for something. The court of appeals acted within its discretion to consider that fact under this last *Almanza* factor.

A defendant suffers egregious harm when a charge error "vitally affect[s] a defensive theory." *Ngo*, 175 S.W.3d at 743. The trial court omitted a key statutory definition from the self-defense instructions; failed to include an application paragraph for self-defense; and placed the self-defense instructions in a confusing location in the charge. The relevant factors show

that Appellant suffered egregious harm from these errors with regard to the assault charge.

2. Appellant suffered egregious harm because of the charge errors related to child endangerment

The court of appeals correctly held that Appellant suffered egregious harm because of the numerous errors in the charge related to child endangerment.

The charge contains the following errors related to the child endangerment charge:

- A) the charge failed to provide the statutory definition for the offense; *see Arteaga*, 521 S.W.3d at 334
- B) the charge failed to provide the statutory definition under section 262.301 of the Family Code for a designated emergency infant care provider even though the application paragraph instructed the jurors that this exception applied²; *Id.*
- C) the term “knowingly” was not properly defined or tailored regardless of whether the offense is result- or conduct-oriented³; *see Price*, 457 S.W.3d at 441

² This statutory exception was included in the charge because the State included it (unnecessarily) in the indictment. (CR67)

³ Some courts have held that child endangerment is a result-oriented offense while others have held that it is conduct-oriented. *Compare Suarez v. State*, No. 05-03-00096-CR, 2003 WL 23025024, at *3 (Tex. App. – Dallas Dec. 30, 2003, pet. ref’d) (not designated for publication) (result-oriented), and *Millslagle v. State*, 81 S.W.3d 895, 896 n.1 (Tex. App. – Austin 2002, pet. ref’d) (same), with *Alcoser v. State*, No. 07-18-00032-CR, 2019 WL 7044470,

D) the term “recklessly” was somewhat truncated from the statutory definition regarding the result of the actor’s conduct

These numerous errors in the charge support a finding of egregious harm as to child endangerment. *See Hollander*, 414 S.W.3d at 750.

During argument, the attorneys disputed whether the State proved Appellant had not voluntarily delivered the child to a designated emergency infant care provider. (8RR33, 41) But the jurors were not even informed as to what statutorily qualified as such a provider. Thus, this factor weighs in favor of a finding of egregious harm. *Id.* at 750-51.

Appellant vigorously disputed the complainant’s testimony in its entirety and particularly with regard to the events that supposedly endangered the child. Accordingly, this factor weighs in favor of a finding of egregious harm. *Id.* at 751-53 (facts “hotly contested”).

The court of appeals considered the fact that, on a macro level, the charge was replete with errors that impacted each offense as an “other relevant factor” in its egregious harm analysis. *See Almanza*, 686 S.W.2d at

at *6 (Tex. App. – Amarillo Dec. 20, 2019, pet. filed) (conduct-oriented), *Walker v. State*, 95 S.W.3d 516, 521 n.1 (Tex. App. – Fort Worth 2003, pet. ref’d) (same).

171; *accord Hollander*, 414 S.W.3d at 750. The fact that this charge was riddled with errors should count for something. The court of appeals acted within its discretion to consider that fact under this last *Almanza* factor.

The relevant factors show that Appellant suffered egregious harm from the errors in the charge related to child endangerment.

3. Appellant suffered egregious harm because of the charge errors related to interference with an emergency call

The court of appeals correctly held that Appellant suffered egregious harm because of the numerous errors in the charge related to interference with an emergency call.

The charge contains the following errors related to the child endangerment charge:

A) the charge failed to provide the statutory definition for the offense; *see Arteaga*, 521 S.W.3d at 334

B) the term “knowingly” was not properly defined or tailored with respect to the circumstances⁴ of the actor’s conduct; *see Price*, 457 S.W.3d at 441

⁴ The court of appeals explained why interference with an emergency call is a circumstances-oriented offense. *See Alcoser*, 2019 WL 7044470, at *6. But even if it is a result-oriented or conduct-oriented offense, the charge failed to properly define or tailor the term “knowingly.”

C) the self-defense instructions began on the same page and immediately following the application paragraph for interference with an emergency call

These numerous errors in the charge support a finding of egregious harm as to interference with an emergency call. *See Hollander*, 414 S.W.3d at 750.

During argument, the prosecutor erroneously blended the applicable culpable mental states together with respect to the charge of interference with an emergency call suggesting that a finding of criminal negligence would support a guilty verdict. (8RR34-35) This only compounded the difficulties caused by the court's failure to properly define or tailor the term knowingly with respect to the circumstances surrounding the actor's conduct. Thus, this factor weighs in favor of a finding of egregious harm. *Id.* at 750-51.

Appellant vigorously disputed the complainant's testimony in its entirety and particularly with regard to the events that supposedly caused damage to the cell phone. Accordingly, this factor weighs in favor of a finding of egregious harm. *Id.* at 751-53 (facts "hotly contested").

The court of appeals considered the fact that, on a macro level, the charge was replete with errors that impacted each offense as an "other

relevant factor” in its egregious harm analysis. *See Almanza*, 686 S.W.2d at 171; *accord Hollander*, 414 S.W.3d at 750. The fact that this charge was riddled with errors should count for something. The court of appeals acted within its discretion to consider that fact under this last *Almanza* factor.

The relevant factors show that Appellant suffered egregious harm from the errors in the charge related to interference with an emergency call.

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2. The court of appeals did not misapply the cumulative error doctrine.

As discussed above, the court of appeals acted within its discretion to consider the errors throughout the charge that impacted each alleged offense as an “other relevant factor” in the *Alamanza* egregious harm analysis.

Prayer

WHEREFORE, PREMISES CONSIDERED, Appellant Danny Wayne Alcoser asks the Court to: (1) refuse the State's petition for discretionary review; and (2) grant such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

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/s/ Alan Bennett
E. Alan Bennett

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/s/ Alan Bennett
E. Alan Bennett

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